

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

October 18, 2011

Les Trobman, General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin Texas 78711-3087

**VIA HAND DELIVERY**

Re: SOAH Docket No. 582-10-1754; TCEQ Docket No.2009-0096-MSW-E; In the  
Matter of an Enforcement Action against Micro Dirt Inc., d/b/a Texas Organic  
Recovery; RN 100628288

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than November 7, 2011. Any replies to exceptions or briefs must be filed in the same manner no later than November 17, 2011.

This matter has been designated **TCEQ Docket No. 2009-0096-MSW-E; SOAH Docket No. 582-10-1754**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "Howard S. Seitzman".

Howard S. Seitzman  
Administrative Law Judge

HSS/pp  
Enclosures  
cc: Mailing List

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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**SERVICE LIST**

**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)

**STYLE/CASE:** MICRO DIRT INC / TEXAS ORGANIC RECOVERY

**SOAH DOCKET NUMBER:** 582-10-1754

**REFERRING AGENCY CASE:** 2009-0096-MSW-E

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ HOWARD S. SEITZMAN**

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**REPRESENTATIVE / ADDRESS**

**PARTIES**

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MICRO DIRT, INC.

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**SOAH DOCKET NO. 582-10-1754**  
**TCEQ DOCKET NO. 2009-0096-MSW-E**

<b>IN THE MATTER OF</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
<b>AN ENFORCEMENT ACTION</b>	§	
	§	
<b>AGAINST MICRO DIRT INC., DBA</b>	§	<b>OF</b>
	§	
<b>TEXAS ORGANIC RECOVERY;</b>	§	
	§	
<b>RN 100628288</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess \$103,800 in administrative penalties against and obtain corrective action from Micro Dirt, Inc., d/b/a/ Texas Organic Recovery (Micro Dirt) for violations dealing with grease trap waste. Simply stated, the ED alleged that Micro Dirt failed to prevent the unauthorized composting and processing of grease trap waste in violation of:

- 1) TEX. HEALTH & SAFETY CODE § 361.428(d);
- 2) Act of June 20, 2003, 78th Leg., R.S., ch. 596, §§ 1-3, 2003 Tex. Gen. Laws 1968, amended by Act of January 11, 2004, 78th Leg., 3rd C.S., ch. 3, § 8.02, sec. 2, 2003 Tex. Gen. Laws 89;
- 3) 30 TEX. ADMIN. CODE (TAC) § 332.3(a)(3);
- 4) 30 TAC § 330.7(a);
- 5) 30 TAC § 330.9(a); and
- 6) 30 TAC § 330.15(a).

The Administrative Law Judge (ALJ) concludes that the ED established that Micro Dirt violated provisions of the statute and the rules. The Commission should find that violations occurred, assess Micro Dirt an administrative penalty of \$103,800, and order that Micro Dirt take corrective action.

## II. PROCEDURAL HISTORY AND JURISDICTION

This case has a rather long and complicated procedural history. The ED filed his Preliminary Report and Petition (EDPRP) on July 13, 2009.<sup>1</sup> Micro Dirt filed its Original Answer on August 3, 2009.<sup>2</sup> By letter dated December 11, 2009, the ED filed a request with Commission's Chief Clerk (Chief Clerk) to refer the enforcement action to the State Office of Administrative hearings (SOAH) pursuant to 30 TAC § 70.109.<sup>3</sup> The Chief Clerk issued a Notice of Public Hearing on December 17, 2009 (Notice).<sup>4</sup> The Notice stated SOAH would convene a hearing at 10 a.m. on January 21, 2010. On January 21, 2010, the ED and Micro Dirt appeared at the preliminary hearing. The ED was represented by Phillip Goodwin and Jennifer Cook and Micro Dirt was represented by Randall Wilburn. The Office of Public Interest Counsel (OPIC) was also a party.

At the commencement of the preliminary hearing, Micro Dirt filed a Plea to the Jurisdiction for failure to comply with statutory notice requirements (Jurisdictional Motion). The ED and Micro Dirt agreed upon a briefing schedule for the Jurisdictional Motion. The ALJ took the Jurisdictional Motion under advisement pending the filing of briefs. Micro Dirt also filed Special Exceptions and a Motion for Costs and Attorney's Fees. Subject to the Jurisdictional Motion and Special Exceptions, the parties agreed to the admission into evidence of four exhibits addressing jurisdiction and notice.

By Order No. 2 dated February 22, 2010, the ALJ denied the Jurisdictional Motion, Special Exceptions, and Motion for Costs and Attorney's Fees. Micro Dirt then filed a Motion for Certified Question and Motion to Abate the Hearing and Discovery Schedule. It sought either certification of two jurisdictional questions to the TCEQ Commissioners or, pursuant to 30 TAC § 80.131(a), an opportunity to file an interlocutory appeal to the Commissioners of the February 22, 2010 Order. The ED and OPIC did not oppose the motion.

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<sup>1</sup> ED. Ex. 1.

<sup>2</sup> ED Ex. 2.

<sup>3</sup> ED Ex. 3.

<sup>4</sup> ED. Ex. 4.

By Order dated March 9, 2010, the ALJ declined to certify the questions proposed by Micro Dirt, but abated the case and gave Micro Dirt a deadline of April 8, 2010, for filing an interlocutory appeal with the Commission. On May 13, 2010, the ED, Micro Dirt, and OPIC filed a status report indicating Micro Dirt had filed its interlocutory appeal and that briefs had been filed by the parties. The parties requested and were granted an extension of the abatement. By letter dated June 9, 2010, the Commission's Office of General Counsel announced the matter would not be set on a Commission public meeting and that the SOAH hearing process could continue. By Order dated June 24, 2010, the ALJ lifted the abatement and required a proposed schedule. The parties filed an Agreed Proposed Hearing Schedule on July 12, 2010, and the hearing on the merits was scheduled for February 10, 2011.

On November 3, 2010, Micro Dirt filed a motion seeking to compel discovery and to amend the discovery schedule. On November 9, 2010, the ED requested and was granted an agreed extension of time to respond. On November 12, 2010, the ED requested and was granted an agreed additional extension of time to respond. The ED filed its response to Micro Dirt's motion on November 17, 2010. On December 8, 2010, Micro Dirt filed a continuance motion to extend the discovery period. The ED filed a response on December 14, 2010, and agreed to the 30-day extension. For good cause shown, the ALJ extended the discovery deadline. On January 13, 2011, the ED filed a Motion to Quash Oral Depositions noticed by Micro Dirt for January 13, 2011. The ED's motion was granted and the depositions of Chris Wiatrek and Kathy Roecker were set for dates on which they were available, January 24 and 25, 2011. On January 18, 2011, Micro Dirt filed a Motion to Quash the ED's Notice to Take Oral Deposition. The ED filed a response on January 20, 2011, and also filed a Motion to Compel.

On January 21, 2011, the ED and Micro Dirt appeared through counsel at a telephonic prehearing conference. Pursuant to that prehearing conference, the case management schedule was modified and the hearing on the merits was continued from February 10, 2011, to March 10, 2011. The ALJ also ruled on the pending discovery disputes involving depositions, document production, responses to interrogatories and admission requests, and privileged document logs.

On February 24, 2011, Micro Dirt filed a Motion to Strike or in the Alternative Motion for Continuance. Micro Dirt objected to the ED's First Amended Preliminary Report and Petition (EDFAPRP) filed on February 10, 2011. By Order No. 12 dated February 25, 2011, the ALJ denied Micro Dirt's motion in all respects because the ED filed the EDFAPRP prior to the March 2, 2011 deadline established in Order No. 11.

The hearing on the merits convened on March 10, 2011, before ALJ Howard S. Seitzman in the William P. Clements Building, 300 West 15<sup>th</sup> Street, Fourth Floor, Austin, Texas. The ED was represented by Ms. Cook, Attorney, Litigation Division. Micro Dirt was represented by its legal counsel, Mr. Wilburn. The hearing recessed when, due to a credible bomb threat, the William P. Clements Building was evacuated and closed. By agreement of the parties, the hearing on the merits reconvened and concluded on June 14, 2011. Written closing arguments and replies were timely submitted by both parties and the record closed on September 2, 2011.

As previously noted, Micro Dirt disputed both jurisdiction and notice. While addressed in earlier orders, the issues will again be discussed later in this Proposal for Decision (PFD).

### **III. APPLICABLE LAW**

Enacted during the 2003 regular session, Section 361.428(d) of the Health & Safety Code § 361.428(d) states:

A person may not commercially compost grease trap waste, as defined by the commission, unless the person has first obtained a permit for composting grease trap waste issued by the commission under this section on or after September 1, 2003.<sup>5</sup>

Later, in a third special session, the legislature amended the regular session provision as follows:

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<sup>5</sup> Act of June 20, 2003, 78th Leg., R.S., ch. 596, §§ 1-3, 2003 Tex. Gen. Laws 1968.

Section 2, Chapter 596, Acts of the 78th Legislature, Regular Session, 2003, is amended to read as follows:

Sec. 2. (a) The Texas Commission on Environmental Quality shall:

- (1) not later than December [~~November~~] 1, 2003:
  - (A) adopt any rules necessary for the implementation of this Act; and
  - (B) notify any person known by the commission to be engaged in the business of composting grease trap waste to submit an application for a permit under Section 361.428(d), Health and Safety Code, as added by this Act; and
- (2) not later than September 1, 2005 [~~January 1, 2004~~], begin issuing permits for the commercial composting of grease trap waste under Sections 361.428(d) and (e), Health and Safety Code, as added by this Act.
- (b) This Act does not prohibit a person who is engaged in the business of composting grease trap waste on the effective date of this Act from continuing to engage in that business if [~~the person~~]:
  - (1) the person submits an application for a permit under Section 361.428(d), Health and Safety Code, as added by this Act, not later than the 30th day after receiving notice from the Texas Commission on Environmental Quality under Subsection (a)(1)(B) of this section; and
  - (2) [~~receives the permit from~~] the commission has declared the application administratively complete on or before June 1, 2004.
- (c) This section does not prohibit the commission from denying a permit application previously declared administratively complete.
- (d) If the commission denies a permit application under this section, the applicant shall cease the operations for which the applicant applied for a permit.<sup>6</sup>

The Commission subsequently adopted the rule codified at 30 TAC § 332.3(a)(3):

(a) Permit required. . . . These operations are required to obtain a permit from the commission under Chapters 305 and 281 of this title (relating to Consolidated Permits; and Applications Processing): . . .

(3) operations that commercially compost grease trap waste on or after September 1, 2003.

Under TEX. WATER CODE § 7.051, the Commission is authorized to assess an administrative penalty against a person who violates a provision of the Water Code within the Commission's jurisdiction, or a rule adopted or an order or permit issued there under. The penalty may not exceed

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<sup>6</sup> Act of June 20, 2003, 78th Leg., R.S., ch. 596, §§ 1-3, 2003 Tex. Gen. Laws 1968, amended by Act of January 11, 2004, 78th Leg., 3rd C.S., ch. 3, § 8.02, sec. 2, 2003 Tex. Gen. Laws 89 (2003 Special Session Legislation).



\$10,000 per day of violation of the applicable sections of the Water Code.<sup>7</sup> Additionally, the Commission may order the violator to take corrective action.<sup>8</sup>

Provisions regarding the opportunity for hearing and notice of hearing in contested cases are found in TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052. Pursuant to TEX. GOV'T CODE ANN. § 2001.051, in a contested case, each party is entitled to an opportunity:

- (1) for hearing after reasonable notice of not less than 10 days; and
- (2) to respond and to present evidence and argument on each issue involved in the case.

The notice requirements are set forth in TEX. GOV'T CODE ANN. § 2001.052:

(a) Notice of a hearing in a contested case must include:

- (1) a statement of the time, place, and nature of the hearing;
  - (2) a statement of the legal authority and jurisdiction under which the hearing is to be held;
  - (3) a reference to the particular sections of the statutes and rules involved; and
  - (4) a short, plain statement of the matters asserted.
- (b) If a state agency or other party is unable to state matters in detail at the time notice under this section is served, an initial notice may be limited to a statement of the issues involved. On timely written application, a more definite and detailed statement shall be furnished not less than three days before the date set for the hearing.

The Commission's enforcement authority is set forth at TEX. WATER CODE § 7.002. It provides:

The commission may initiate an action under this chapter to enforce provisions of this code and the Health and Safety Code within the commission's jurisdiction as provided by Section 5.013 of this code and rules adopted under those provisions. The commission or the executive director may institute legal proceedings to compel compliance with the relevant provisions of this code and the Health and Safety Code and rules, orders, permits, or other decisions of the commission. The commission may delegate to the executive director the authority to issue an

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<sup>7</sup> TEX. WATER CODE § 7.052(c).

<sup>8</sup> TEX. WATER CODE § 7.073.

administrative order, including an administrative order that assesses penalties or orders corrective measures, to ensure compliance with the provisions of this code and the Health and Safety Code within the commission's jurisdiction as provided by Section 5.013 of this code and rules adopted under those provisions.

With respect to hearings in enforcement cases TEX. WATER CODE § 7.058 provides:

If the person charged requests or the commission orders a hearing, the commission shall order and shall give notice of the hearing. The commission by order may find that a violation has occurred and may assess a penalty, may find that a violation has occurred but that a penalty should not be assessed, or may find that a violation has not occurred. In making a penalty decision, the commission shall analyze each factor prescribed by Section 7.053. All proceedings under this section are subject to Chapter 2001, Government Code.

#### IV. FACTS

Micro Dirt owns and operates a composting facility located at 15500 Goforth Road, Creedmoor, Travis County, Texas (Facility). In 1998, pursuant to 30 TAC ch. 332, the TCEQ issued a composting registration (Registration) to Micro Dirt allowing Micro Dirt to compost the following wastes: municipal sewer sludge, septage, grease trap, paper, vegetative waste matter, brush, and wood and yard waste. In 1998, grease trap composting did not require a permit.

The legislature changed the law in 2003 and required a person to have a permit issued by the Commission to commercially compost grease trap waste. On January 26, 2004, Micro Dirt filed its permit application (Application) to compost grease trap waste with the TCEQ. There is no dispute that Micro Dirt timely filed a permit application and it was timely determined to be administratively complete.

The Commission denied the Application in an order issued on May 23, 2008 (the Order). Micro Dirt filed a motion for rehearing on June 18, 2008. In a letter dated July 18, 2008, the TCEQ's General Counsel stated that the motion for rehearing was overruled by operation of law on July 15, 2008.

On August 8, 2008, TCEQ investigator Ms. Roecker conducted an onsite investigation at the Facility to determine if Micro Dirt was accepting and composting grease trap waste after the Application was denied. At the investigation, Micro Dirt's representatives provided Ms. Roecker trip tickets, or manifests, showing that Micro Dirt did continue to accept grease trap waste after July 15, 2008. Ms. Roecker estimated about 123 loads of grease trap waste had been accepted between July 16, 2008, and August 8, 2008, based on her onsite review of the trip tickets. After TCEQ staff was able to obtain copies of the trip tickets, it performed a more detailed review of the trip tickets and developed a spreadsheet containing information on all the trip tickets. Based on the spreadsheet, TCEQ staff determined that there were 97 loads instead of 123. At the hearing on June 14, 2011, both parties presented separate spreadsheets regarding the number of loads. After the hearing, TCEQ staff has had an opportunity to compare both spreadsheets. Based on the comparison, the ED conceded two additional loads for a total of 95 loads. The loads contained a total of approximately 226,335 gallons of grease trap waste.

## **V. GENERAL ISSUES PRESENTED**

1. Does SOAH have jurisdiction to hear the contested enforcement case absent an order from the Commissioners referring the case to SOAH for a contested case hearing?
2. Was the Notice of Hearing legally sufficient?
3. Given that Micro Dirt timely filed an administratively complete Application, was the 1998 Registration sufficient authorization for Micro Dirt to continue composting grease trap waste after the Application was denied?
4. What is the date on which the May 23, 2008 Order denying the Application was overruled by operation of law?
5. Was the administrative penalty correctly calculated?
6. What corrective action measures, if any, should be ordered?

## VI. ALJ'S DISCUSSION AND ANALYSIS

### A. Jurisdiction

Micro Dirt did not contest the jurisdiction of the Commission. Micro Dirt did contend that only the Commission, acting through the Commissioners, may order an enforcement hearing. Since the Commission did not issue an order sending the case to a contested case hearing, Micro Dirt contended that SOAH did not have jurisdiction to hear the case.

The Commissioners need not formally meet and order a hearing in every case. The person charged with a violation may request a hearing, or the Commission may order a hearing. In either event, the Commission is then required to order and give notice of the hearing.<sup>9</sup> The Commissioners have adopted rules addressing the procedures for a contested enforcement case.<sup>10</sup> Any enforcement action brought under these rules may be initiated by an Executive Director's Preliminary Report (EDPR)<sup>11</sup> being filed by the ED with the Chief Clerk.<sup>12</sup> In a contested enforcement case, unless the Commission chooses to hear the case itself, SOAH has the delegated authority to preside over the case under 30 TAC § 80 *et seq.*<sup>13</sup>

After the respondent has filed an answer under 30 TAC § 70.105, either the respondent or the ED may request that the chief clerk refer the case to SOAH for a contested enforcement case hearing. The parties may request this referral by filing a letter with the Chief Clerk and serving that letter on

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<sup>9</sup> TEX. WATER CODE § 7.058. If the person charged requests or the commission orders a hearing, the commission shall order and shall give notice of the hearing. The commission by order may find that a violation has occurred and may assess a penalty, may find that a violation has occurred but that a penalty should not be assessed, or may find that a violation has not occurred. In making a penalty decision, the commission shall analyze each factor prescribed by Section 7.053. All proceedings under this section are subject to Chapter 2001, Government Code.

<sup>10</sup> 30 TAC §§ 70.101 *et seq.*, and 80.1 *et seq.*

<sup>11</sup> An EDPR shall include a brief statement of the nature of the violation, the statute or statutes violated, the facts relied upon by the executive director in concluding that a violation has occurred, a recommendation that an administrative penalty be assessed, the amount of the recommended penalty, any corrective action to be taken by the respondent, and an analysis of the factors required in the relevant statute and rules to be considered by the commission in determining the amount of the penalty. 30 TAC § 101(b).

<sup>12</sup> 30 TAC § 70.101(a).

<sup>13</sup> 30 TAC § 70.108.

the other parties. If the Chief Clerk receives authorization to refer a case to SOAH, the case is referred under the provisions of 30 TAC §80.5.<sup>14</sup> When a case is referred to SOAH, the Chief Clerk files either a request for setting or a request for assignment and coordinates with SOAH to determine a time and place for hearing. The Chief Clerk also issues public notice of the hearing as required by law and Commission rules and sends a copy of the Chief Clerk's case file to SOAH. In an enforcement case, the ED's petition or EDPR shall serve as the list of issues or areas that must be addressed.<sup>15</sup>

The case in question is a contested enforcement case. The Commission is authorized to conduct hearings in contested enforcement cases. The Commission has authorized SOAH to conduct the procedural and evidentiary hearings in contested enforcement cases. In response to the July 13, 2008 EDPRP, Micro Dirt filed its Original Answer. In its Original Answer, Micro Dirt requested a contested case hearing.<sup>16</sup> The Commission then followed the procedures set forth in its rules with respect to ordering a hearing. In accordance with 30 TAC § 70.109, the ED filed a request for referral to SOAH with the Chief Clerk of the Commission. The Chief Clerk, in accordance with 30 TAC § 70.109, referred the case to SOAH and issued a Notice of Public Hearing.

Micro Dirt failed to adduce any language that restricts the statutory authority of the Commissioners to adopt rules governing contested enforcement cases.<sup>17</sup> The ALJ finds the Commission properly referred the case and SOAH has jurisdiction to conduct the contested case hearing and provide a PFD to the Commission.

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<sup>14</sup> 30 TAC § 70.109.

<sup>15</sup> 30 TAC § 80.1.

<sup>16</sup> ED. Ex. 2.

<sup>17</sup> In fact, TEX. WATER CODE § 7.002 further undercuts Micro Dirt's position. The statute provides:

The commission may initiate an action under this chapter to enforce provisions of this code and the Health and Safety Code within the commission's jurisdiction as provided by Section 5.013 of this code and rules adopted under those provisions. The commission or the executive director may institute legal proceedings to compel compliance with the relevant provisions of this code and the Health and Safety Code and rules, orders, permits, or other decisions of the commission. The commission may delegate to the executive director the authority to issue an administrative order, including an administrative order that assesses penalties or orders corrective measures, to ensure compliance with the provisions of this code and the Health and Safety Code within the commission's jurisdiction as provided by Section 5.013 of this code and rules adopted under those provisions.

**B. Notice**

Micro Dirt also contested the adequacy of the preliminary hearing notice by claiming it failed to include the statutory authority for the hearing. A notice of a hearing in a contested case must include:

- (1) a statement of the time, place, and nature of the hearing;
- (2) a statement of the legal authority and jurisdiction under which the hearing is to be held;
- (3) a reference to the particular sections of the statutes and rules involved; and
- (4) a short, plain statement of the matters asserted.<sup>18</sup>

This is akin to the “fair-notice” standard for pleading in the Texas courts.<sup>19</sup> In a trial court, the standard for pleading “looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant.”<sup>20</sup> In a contested case proceeding, a party is entitled to an opportunity to respond and to present evidence and argument on each issue involved in the case.<sup>21</sup> A plaintiff, in this case the ED, is not required to describe the evidence in detail.<sup>22</sup>

The July 13, 2009 EDPRP is directly referenced in the Commission’s December 17, 2009 notice setting the preliminary hearing.<sup>23</sup> The ED’s allegations are simple and straightforward. The ED alleges that Micro Dirt accepted grease trap waste between July 16, 2008, and August 8, 2008, even though it did not have a permit to compost grease trap waste.<sup>24</sup> Paragraph 5 of the EDPRP

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<sup>18</sup> TEX. GOV’T CODE ANN. § 2001.052; *see also* *Garza v. Texas Alcoholic Beverage Comm.*, 138 S.W.3d 609, 618-619 (Tex. App.-Houston [14<sup>th</sup> Dist.] 2004, no pet.).

<sup>19</sup> TEX. R. CIV. P. 45(b) and 47(a); *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000).

<sup>20</sup> *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887 at 896.

<sup>21</sup> TEX. GOV’T CODE ANN. § 2001.051; *Madden v. Tex. Bd. of Chiropractic Examiners*, 663 S.W.2d 622, 626 (Tex. App.-Austin, 1983, writ ref’d n.r.e.).

<sup>22</sup> *Paramount Pipe & Supply v. Muhr*, 749 S.W.2d 491, 494-495 (Tex. 1988); *Garza v. Texas Alcoholic Beverage Comm.*, 138 S.W.3d 609 at 618-619.

<sup>23</sup> ED Ex. 4.

<sup>24</sup> ED Ex. 1, p. 2 ¶ 5.

references TEX. HEALTH & SAFETY CODE § 361.428(d)<sup>25</sup> and 30 TAC § 332.3(a)(3).<sup>26</sup> These provisions indicate a permit is needed to commercially compost grease trap waste. The hearing notice cites the rules and statutes the ED alleged Micro Dirt violated.<sup>27</sup> The Notice, in a paragraph entitled “Legal Authority,” cites TCEQ’s enforcement jurisdiction in TEX. WATER CODE ch. 7, TEX. HEALTH & SAFETY CODE ch. 361,<sup>28</sup> TCEQ’s procedural rules for contested cases, and SOAH’s procedural rules.

The February 10, 2011 EDFAPRP was filed after discovery had commenced. The violations alleged in the EDFAPRP generally track the same rules and statutes as the pre-discovery July 13, 2009 EDPRP. The EDPRP alleged that Micro Dirt’s Facility managed and/or disposed of municipal solid waste as defined in TEX. HEALTH & SAFETY CODE ch. 361. The EDPRP alleged Micro Dirt failed:

to obtain a permit to compost grease trap waste. Specifically, 123 loads of grease trap waste were accepted between July 16, 2008 and August 8, 2008 without proper authorization.<sup>29</sup>

The EDFAPRP added alleged violations of 30 TAC §§ 330.7(a), 330.9(a), and 330.15(a). These relate to solid waste and municipal solid waste.<sup>30</sup> The EDFAPRP alleged Micro Dirt failed:

to prevent the unauthorized collection, storage, transportation, processing, composting or disposal of solid waste, or the use or operation of a solid waste facility to store, process, or dispose of solid waste. Specifically, 123 loads of grease trap waste were accepted between July 16, 2008 and August 8, 2008 without proper authorization.<sup>31</sup>

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<sup>25</sup> A person may not commercially compost grease trap waste, as defined by the commission, unless the person has first obtained a permit for composting grease trap waste issued by the commission under this section on or after September 1, 2003.

<sup>26</sup> A permit is required for “operations that commercially compost grease trap waste on or after September 1, 2003. Grease trap waste is material collected in and from an interceptor in the sanitary sewer service line of a commercial, institutional, or industrial food service or processing establishment, including the solids resulting from de-watering processes.”

<sup>27</sup> ED Ex. 4, ¶ 2.

<sup>28</sup> Also referred to as the Solid Waste Disposal Act.

<sup>29</sup> ED Ex. 5, p.2.

<sup>30</sup> As later discussed, municipal solid waste is a subset of solid waste.

<sup>31</sup> ED Ex. 5, p.2.

Both the original pleading and the amended pleading alleged Micro Dirt violated the regulatory requirements that it possess a permit to compost grease trap waste after July 15, 2008. Further, because grease trap waste is both a solid waste and a municipal solid waste, the amended pleading alleged Micro Dirt violated the regulatory provisions that prohibit the composting or processing of a solid waste and a municipal solid waste without proper authorization or permit by composting grease trap waste after July 15, 2008. The addition of the 30 TAC §§ 330.7(a), 330.9(a), and 330.15(a) violations did not change the calculation of the administrative penalty.

Micro Dirt was able to ascertain from the pleadings the nature and basic issues of the controversy and what testimony would be relevant. Micro Dirt was afforded an opportunity to respond and to present evidence and argument on each issue involved in the case. The notice provided to Micro Dirt complied with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

**C. Alleged Violations**

**1. Given that Micro Dirt timely filed an administratively complete Application, was the 1998 Registration sufficient authorization for Micro Dirt to continue composting grease trap waste after the Application was denied?**

Micro Dirt had previously denied composting grease trap waste after its Application was denied. By the time of the March 2011 hearing, Micro Dirt admitted that it composted grease trap waste after the Application was denied. Mark Van Sickle, the CEO and General Manager of Micro Dirt, admitted to composting all of the grease trap loads Micro Dirt received. Mr. Van Sickle acknowledged that Micro Dirt received money in exchange for accepting the grease trap waste and that it received additional income from the sale of composted grease trap waste.

Micro Dirt maintained that it is authorized to compost under the 1998 Registration because it timely filed the Application and the Application was timely determined to be administratively complete. The ED contended, based upon the 2003 legislative change, the Registration no longer authorized composting activity after Micro Dirt's Application was denied. The ED concluded that



Micro Dirt was in violation of TEX. HEALTH & SAFETY CODE § 361.428(d) when it failed to cease composting grease trap waste following denial of the Application.

The ED is correct. Under the 2003 legislation, once Micro Dirt timely filed its Application its Registration allowed it to continue composting grease trap waste throughout the permit application process. When the Application was denied, Micro Dirt was no longer authorized to compost grease trap waste under the Registration.

Additionally, Micro Dirt's Registration did not authorize the processing of grease trap waste other than by composting. The Registration was issued pursuant to 30 TAC ch. 332, the composting chapter of the Commission's rules. Micro Dirt is correct that the Registration uses the word "process," but is incorrect that the term process covers more than composting. Chapter 332 defines "process" as:

Actions that are taken to land apply feedstocks or convert feedstock materials into finished compost, mulch or a useable final product. Processing does not include the stockpiling of materials.<sup>32</sup>

Wayne Harry, a TCEQ municipal solid waste permitting program employee, testified that the only process allowed by the Registration is composting. To process grease trap waste other than by composting, Micro Dirt would need an authorization pursuant to 30 TAC ch. 330. Chapter 330 contains the regulations regarding processing municipal solid waste, while chapter 332 contains only regulations regarding composting. Mr. Harry's opinion is further supported by correspondence exchanged by the parties during late 2008 and early 2009. In October 2008, Micro Dirt applied to modify its Registration.<sup>33</sup> The Commission's January 7, 2009 letter explained that Micro Dirt could not use its chapter 332 Registration to engage in processes that are not encompassed within chapter 332:

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<sup>32</sup> 30 TAC § 332.2(47).

<sup>33</sup> ED. Ex. 39.

The existing composting registration was issued under the authority of 30 TAC 332, not 30 TAC 330. There is no regulatory means to modify a registration issued under one rule set using a different rule set. Therefore we cannot process your registration modification. . . . [A] Chapter 330 registration for a Type V grease trap processing facility appears to be the most appropriate authorization for the activity you propose.<sup>34</sup>

Grease trap waste is both a municipal solid waste and a solid waste.<sup>35</sup> 30 TAC § 330.7(a) prohibits any activity of processing solid waste without a permit or other authorization.<sup>36</sup> 30 TAC 330.9(a) prohibits any activity of processing municipal solid waste without a registration or other authorization.<sup>37</sup> The definition of processing in 30 TAC ch. 330 is broad and encompasses composting.<sup>38</sup> Because Micro Dirt was composting grease trap waste, a municipal solid waste and a solid waste, without authorization, it also violated both 30 TAC §§ 330.7(a) and 330.9(a).

Additionally, 30 TAC § 330.15(a) prohibits a person from processing municipal solid waste in violation of the Texas Health and Safety Code, any regulations, or any rules. Specifically it states:

A person may not cause, suffer, allow, or permit the collection, storage, transportation, processing, or disposal of municipal solid waste (MSW), or the use or operation of a solid waste facility to store, process, or dispose of solid waste, or to extract materials under Texas Health and Safety Code, § 361.092, in violation of the

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<sup>34</sup> ED Ex. 40.

<sup>35</sup> The definition of solid waste is broad, and generally includes discarded material from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. 30 TAC § 330.3(145). As such, it encompasses municipal solid waste which is solid waste resulting from municipal, community, commercial, institutional, and recreational activities. 30 TAC § 330.3(88). Grease trap waste includes material collected in and from a grease interceptor in the sanitary sewer service line of a commercial, institutional, or industrial food service or processing establishment. 30 TAC § 330.3(59). It is a municipal solid waste, and consequently, a solid waste.

<sup>36</sup> [N]o person may cause, suffer, allow, or permit any activity of storage, processing, removal, or disposal of any solid waste unless such activity is authorized by a permit or other authorization from the commission.

<sup>37</sup> [N]o person may cause, suffer, allow, or permit any activity of storage, processing, removal, or disposal of any municipal solid waste (MSW) unless that activity is authorized by a registration or other authorization from the commission.

<sup>38</sup> The definition of processing is: activities including, but not limited to, the extraction of materials, transfer, volume reduction, conversion to energy, or other separation and preparation of solid waste for reuse or disposal, including the treatment or neutralization of waste, designed to change the physical, chemical, or biological character or composition of any waste to neutralize such waste, or to recover energy or material from the waste, or render the waste safer to transport, store, dispose of, or make it amenable for recovery, amenable for storage, or reduced in volume. 30 TAC § 330.3(116).

Texas Health and Safety Code, or any regulations, rules, permit, license, order of the commission . . . .

Since Micro Dirt processed municipal solid waste in violation of TEX. HEALTH & SAFETY CODE § 361.428(d); the 2003 Special Session Legislation; 30 TAC § 332.3(a)(3); 30 TAC § 330.7(a), and 30 TAC § 330.9(a), it also violated 30 TAC § 330.15(a).

**2. What is the date on which the May 23, 2008 Order denying the Application was overruled by operation of law?**

Micro Dirt filed its Application in January 2004. On May 23, 2008, the Commission issued the Order denying Micro Dirt's Application.<sup>39</sup> The Chief Clerk mailed the Order to Micro Dirt's representatives on May 28, 2008.<sup>40</sup> A party or attorney of record is presumed to have been notified on the third day after the date the notice is mailed.<sup>41</sup> Thus, Micro Dirt was notified on May 31, 2008, the third day after May 28, 2008. Micro Dirt timely filed a motion for rehearing on June 18, 2008.<sup>42</sup> When a motion for rehearing is filed, an order is final on the date an order overruling the motion is rendered, or the date the motion for rehearing is overruled by operation of law.<sup>43</sup> Because the Commission did not issue an order overruling Micro Dirt's motion for rehearing, the Order became final on the date Micro Dirt's motion for rehearing was overruled by operation of law. A motion for rehearing is overruled by operation of law 45 days after the date the party is notified of the order that may become final.<sup>44</sup> By law, the May 23, 2008 Order was final on July 15, 2008, 45 days after May 31, 2008. By letter dated July 18, 2008, the General Counsel of the Commission notified Micro Dirt that its motion for rehearing was overruled by operation of law on July 15, 2008. The date the motion for rehearing was overruled by operation of law is the crucial date, not the date of the General

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<sup>39</sup> ED Ex. 23.

<sup>40</sup> ED Ex. 37, pp. 13486-13492.

<sup>41</sup> TEX. GOV'T CODE ANN. §§ 2001.142(b) and (c); 30 TAC § 80.271(d)(1).

<sup>42</sup> ED Ex. 24.

<sup>43</sup> TEX. GOV'T CODE ANN. § 2001.144(2).

<sup>44</sup> TEX. GOV'T CODE ANN. § 2001.146(2). There was no extension of time under TEX. GOV'T CODE ANN. § 2001.146(e).

Counsel's letter. Thus, beginning July 16, 2008, Micro Dirt had no legal authorization to compost grease trap waste.

Micro Dirt's contention that it could continue to compost grease trap waste ignores the express provision of the 2003 Special Session Legislation that an applicant, who seeks and is denied an application, must cease the operations it sought to permit. Micro Dirt's authority to accept and compost waste under its Registration expired on July 15, 2008. Micro Dirt does not have a permit to compost grease trap waste. Therefore, receiving and composting grease trap waste on or after July 16, 2008, violated TEX. HEALTH & SAFETY CODE § 361.428(d); the Special Session Legislation; and 30 TAC § 332.3(a)(B). For reasons previously discussed, it also violated 30 TAC §§ 330.7(a), 330.9(a), and 330.15(a).

#### **D. Grease Trap Load Count**

Both the ED and Micro Dirt offered evidence of the number of truck loads in the form of a spreadsheet. Micro Dirt, consistent with its legal arguments, based its spreadsheet on an effective Order date of July 18, 2008. It did not include any loads for the days of July 16-18, 2008. The ED, consistent with its legal arguments, based its spreadsheet on an effective Order date of July 15, 2008, and included 29 loads received during July 16-18, 2008. The ED's spreadsheet showed a total of 97 loads while Micro Dirt's spreadsheet showed a total of 62 loads. Adding the 29 loads for July 16-18, 2008, to Micro Dirt's count, brings its total to 91. This left an eight-load discrepancy. After a detailed comparison of the two spreadsheets, the ED concedes two additional loads and reduces its load count from 97 to 95.<sup>45</sup> This leaves a six-load difference.

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<sup>45</sup> First, the ED conceded that the two trip tickets from transporter Superior Septic dated August 4, 2008, comprise one load instead of two. The ED listed them as separate loads because the time on one of them was not legible. Micro Dirt listed them in the same load on its spreadsheet. Second, the ED conceded that a trip ticket from transporter Texas Organic Recovery is not a separate load and is included as part of the 3:15 load from transporter Texas Organic Recovery dated July 25, 2008. The ED listed this ticket at MD 280 as a separate load because the "Generator Info" and "Transporter Info" on the ticket both indicated a date of July 22, 2008. However, the "Receiver Info" indicated a date of July 25, 2008, and MD 280 has the same time as the other tickets of that date, 3:15. Micro Dirt's spreadsheet lists MD 280 with the other tickets from transporter Texas Organic Recovery dated July 25, 2008 and a time of 3:15.

Micro Dirt's spreadsheet incorrectly combines the 7:45 load from transporter Plummers Enviro with the 11:00 load from Plummers Enviro on July 21, 2008. The ED's spreadsheet correctly counted these as two loads. Micro Dirt's spreadsheet incorrectly combined the 12:00 load from Texas Organic Recovery with the 3:00 load from Texas Organic Recovery on July 23, 2008. The ED's spreadsheet correctly counted these as two loads. Micro Dirt's spreadsheet incorrectly combined the 8:00 load from Pumpin Pros with the 11:30 load from Pumpin Pros on July 25, 2008. The ED's spreadsheet correctly counted these as two loads. Micro Dirt's spreadsheet incorrectly combined the 7:00 load from Pumpin Pros with the 11:30 load from Pumpin Pros on July 29, 2008. The ED's spreadsheet correctly counted these as two loads. Micro Dirt's spreadsheet incorrectly combined the 11:40 load from Texas Organic Recovery with the 3:05 load from Texas Organic Recovery on July 29, 2008. The ED's spreadsheet correctly counted these as two loads. This leaves a one-load discrepancy.

Micro Dirt counted one load that the ED contends should not be counted. Micro Dirt's spreadsheet counted trip ticket MD 443 as a load on July 20, 2008, and trip ticket MD 440 as a load on July 22, 2008, for two separate loads. The ED included them in the same load on July 22, 2008. While trip ticket MD 443 does identify July 20, 2008, at the top of the trip ticket in the generator and transporter information sections, it identifies a July 22, 2008 disposal date at the bottom of the page. The ED's spreadsheet correctly counted these as one load rather than two loads.

Micro Dirt received and composted 95 loads of grease trap waste for the period July 16, 2008, through August 8, 2008.

#### **E. Administrative Penalties**

The TCEQ Enforcement Waste Section Manager, Tim Haase, testified regarding the appropriate penalty for this case. He testified that this amount was determined by applying the TCEQ Penalty Policy (Penalty Policy)<sup>46</sup> and that the calculated penalty in this case is in accordance with the Penalty Policy. Mr. Haase recommended a Violation Base Penalty of \$1,000 per load; a 4%

enhancement based on the Micro Dirt's compliance history; and an additional \$5,000 enhancement to capture avoided costs associated with the violation. The total of these amounts is \$103,800.

Because there is only one violation in this case, there is only one Violation Base Penalty. The violation is considered a programmatic major, which amounts to \$1,000 for each Violation Event. Mr. Haase testified that this violation is appropriately categorized as a discrete violation. For discrete violations, one penalty event is assessed for each documented observation of non-compliance. Each time Micro Dirt accepted a load of grease trap waste for composting or processing, it was in violation. According to Micro Dirt's grease trap waste manifests, from July 16, 2008, through the date of the investigation, August 8, 2008, Micro Dirt accepted 95 loads of grease trap waste, totaling 226,335 gallons. The penalty is calculated based on 95 Violation Events, yielding a Violation Base Penalty of \$95,000.

The compliance history enhancement is based on two prior Notices of Violations (NOVs) for dissimilar violations. According to the Penalty Policy, there is a 2 percent enhancement to the Violation Base Penalties for each prior dissimilar NOV. Four percent of \$95,000 is \$3,800.

The \$5,000 enhancement for avoided costs is based on the estimated cost of obtaining a permit through the permit process, which can include a contested case hearing. By failing to obtain a permit prior to the alleged unauthorized activity, Micro Dirt avoided the cost of a successful permit process. Mr. Haase testified that the Commission consistently enhances penalties to capture avoided costs as a mechanism to minimize a respondent's gain by engaging in the unauthorized activity. Mr. Haase also testified that this is a consistent application of avoided costs for this type of violation.

Mr. Haase testified that a penalty is necessary and appropriate based on the statutory factors in TEX. WATER CODE § 7.053.<sup>47</sup> Mr. Haase testified that the penalty in this case was appropriate

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<sup>46</sup> ED Ex. 32, *Penalty Policy of the Texas Commission on Environmental Quality*, September 2002, RG-253.

<sup>47</sup> The ED must consider the following factors:

- the history and extent of previous violations;
- the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;

considering the statutory factors, including the amount of waste involved, the money Micro Dirt received for accepting the waste, and the need for deterrence. Micro Dirt not only received money for every gallon of waste that it accepted, it was additionally compensated for the compost product it sold.

While the Commission has repeatedly told Micro Dirt that it cannot process or compost grease trap waste, Micro Dirt continued to maintain a legally untenable argument that it could compost and process grease trap waste. Micro Dirt also denied it was composting grease trap waste, abandoning that position only just before the March 2011 hearing.

Micro Dirt made several arguments with respect to the penalty calculation. It contended that it composted only one time, there was only one composting pile, and that it stopped on August 8, 2008. The credible evidence in the record is that Micro Dirt received and composted 95 separate and discrete loads of grease trap waste, approximating 226,000 gallons, between July 16, 2008, and August 8, 2008. Micro Dirt was compensated for taking each load of the grease trap waste. Micro Dirt sprayed each load as it came in and composted each load.

In accordance with the Penalty Policy and the credible evidence in the record, the ED correctly calculated an administrative penalty of \$103,800. In light of the statutory factors of TEX. WATER CODE § 7.053, the administrative penalty of \$103,800 is reasonable and appropriate in this case.

#### **F. Corrective Action**

In light of Micro Dirt's contentions that it can continue to process and compost grease trap waste, corrective actions are necessary for compliance. The ED now recommends corrective actions

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- the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
  - economic benefit gained through the violation;
  - the amount necessary to deter future violations; and
  - any other matters that justice may require.

which are narrower than the corrective actions in the EDFAPRP. Specifically, the ED now seeks the following corrective actions:

- 1) Immediately upon the effective date of the Commission Order, Micro Dirt shall cease unauthorized accepting, processing, or composting of grease trap waste, or the use or operation of a solid waste facility to process grease trap waste until proper authorization is received from the TCEQ.
- 2) Within 45 days after the effective date of the Commission Order, Micro Dirt shall submit written certification and detailed supporting documentation, including photographs, receipts, and /or other records, to demonstrate compliance with Ordering Provision No. 2. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

“I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

Micro Dirt shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions to:

Order Compliance Team  
Enforcement Division, MC 149A  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

with a copy to:

Barry Kalda, Waste Section Manager  
Texas Commission on Environmental Quality  
Austin Regional Office  
2800 S. IH-35, Suite 100  
Austin, Texas 78704-5712



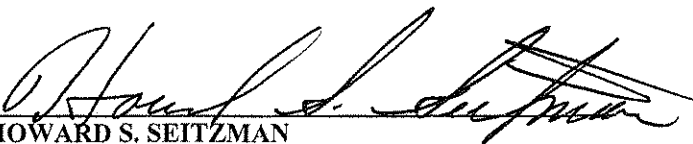
The ALJ finds the corrective actions sought by the ED in this case are appropriate.

## VII. SUMMARY

The Commission and SOAH have jurisdiction over this contested enforcement case. The notice of hearing complied with all applicable requirements. Micro Dirt's 1998 Registration was a composting registration only and the only process allowed was composting. The 1998 Registration expired when Micro Dirt's motion for rehearing of the May 23, 2008 Order denying the Application was overruled by operation of law on July 15, 2008. Commencing July 16, 2008, Micro Dirt was not authorized to compost grease trap waste. Micro Dirt did not have any separate authorization or permit to process grease trap waste. Micro Dirt composted grease trap waste after July 15, 2008, in violation of TEX. HEALTH & SAFETY CODE § 361.428(d); the Special Session Legislation; and 30 TAC § 332.3(a)(B). By composting or processing grease trap waste after July 15, 2008, Micro Dirt also violated 30 TAC §§ 330.7(a), 330.9(a), and 330.15(a).

An administrative penalty of \$103,800 complies with the factors in Water Code § 7.053 and with the Commission's Penalty Policy. Micro Dirt should also be compelled to take the corrective action proposed by the ED. The ALJ recommends that the Commission adopt the Findings of Fact and Conclusions of Law appearing in the Proposed Order.

**SIGNED October 18, 2011.**

  
HOWARD S. SEITZMAN  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**



**AN ORDER Assessing Administrative Penalties Against and  
Requiring Corrective Action by  
Micro Dirt, Inc., d/b/a/ Texas Organic Recovery  
TCEQ DOCKET NO. 2009-0096-MSW-E  
SOAH DOCKET NO. 582-10-1754**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's First Amended Preliminary Report and Petition (EDFAPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against and seeking corrective action from Micro Dirt, Inc., d/b/a/ Texas Organic Recovery (Respondent). Howard S. Seitzman, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on March 10, 2011, and on June 14, 2011, in Austin, Texas, and presented the Proposal for Decision.

The following are parties to the proceeding: Respondent, the Commission's Executive Director (ED), and the Office of Public Interest Counsel (OPIC).

After considering the ALJ's Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

**I. FINDINGS OF FACT**

1. Respondent owns and operates a composting facility located at 15500 Goforth Road, Creedmoor, Travis County, Texas (Facility).
2. On December 4, 1998, pursuant to 30 TEX. ADMIN. CODE (TAC) ch. 332, the TCEQ issued a composting registration (Registration) to Respondent allowing it to compost the following wastes: municipal sewer sludge, septage, grease trap, paper, vegetative waste matter, brush, and wood and yard waste.
3. In 1998, grease trap composting did not require a permit.

4. The legislature changed the law in 2003 and required a person to have a permit issued by the Commission to commercially compost grease trap waste.
5. On January 26, 2004, Respondent filed with the TCEQ its permit application (Application) to compost grease trap waste.
6. The Application was determined to be administratively complete on April 15, 2004.
7. The Commission denied the Application in an order issued on May 23, 2008, in TCEQ Docket No. 2005-1510-MSW (the Order).
8. The Commission's Chief Clerk (Chief Clerk) mailed the Order to Respondent's representatives on May 28, 2008.
9. For purposes of calculating when Respondent's motion for rehearing was overruled by operation of law, Respondent was notified of the Order on May 31, 2008, the third day after May 28, 2008.
10. Respondent filed a motion for rehearing on June 18, 2008. The Commission took no action on Respondent's motion for rehearing.
11. In a letter dated July 18, 2008, the TCEQ's General Counsel stated that the motion for rehearing was overruled by operation of law on July 15, 2008.
12. On August 8, 2008, TCEQ investigator Kathy Roecker conducted an onsite investigation at the Facility to determine if Respondent was accepting and composting grease trap waste after the Application was denied.
13. At the investigation, Respondent's representatives provided Ms. Roecker trip tickets, or manifests, showing that Respondent did continue to accept grease trap waste after July 15, 2008.
14. Ms. Roecker initially estimated about 123 loads of grease trap waste had been accepted between July 16, 2008, and August 8, 2008, based on her onsite review of the trip tickets. Further review of the documents led to a decreased load count.
15. Respondent received and composted 95 loads of grease trap waste during the period July 16, 2008, through August 8, 2008.
16. The 95 loads contained approximately 226,335 gallons of grease trap waste.
17. A Notice of Enforcement (NOE) was issued on December 4, 2008.
18. The ED filed his Preliminary Report and Petition (EDPRP) on July 13, 2009.

19. Respondent filed its Original Answer on August 3, 2009. In its Original Answer, Respondent requested a contested case hearing.
20. By letter dated December 11, 2009, the ED filed a request with the Chief Clerk to refer the enforcement action to SOAH pursuant to 30 TAC § 70.109.
21. The Chief Clerk issued a Notice of Public Hearing on December 17, 2009 (Notice).
22. The December 17, 2009 Notice of Hearing:
  - Stated the time, date, place, and nature of the hearing;
  - Stated the legal authority and jurisdiction for the hearing;
  - Referenced the statutes and rules the ED alleged Respondent violated;
  - Contained a plain statement of the matters asserted;
  - Advised Respondent, in at least 12-point bold-faced type, that failure to appear at the preliminary hearing in person or by legal representative would result in the factual allegations contained in the Notice and the previously filed EDPRP being deemed as true and the relief sought in the Notice possibly being granted by default; and
  - Included a copy of the ED's penalty calculation worksheet (PCW), which shows how the penalty was calculated for the alleged violations.
23. On January 21, 2010, the ED and Respondent appeared at the preliminary hearing. The ED was represented by Phillip Goodwin and Jennifer Cook and Respondent was represented by Randall Wilburn. The Office of Public Interest Counsel (OPIC) was also a party.
24. At the commencement of the preliminary hearing, Respondent filed a Plea to the Jurisdiction for failure to comply with statutory notice requirements (Jurisdictional Motion). The ED and Respondent agreed upon a briefing schedule for the Jurisdictional Motion. The ALJ took the Jurisdictional Motion under advisement pending the filing of briefs. Respondent also filed Special Exceptions and a Motion for Costs and Attorney's Fees. Subject to the Jurisdictional Motion and Special Exceptions, the parties agreed to the admission into evidence of four exhibits addressing jurisdiction and notice.
25. By Order No. 2 dated February 22, 2010, the ALJ denied the Jurisdictional Motion, Special Exceptions, and Motion for Costs and Attorney's Fees. Respondent then filed a Motion for Certified Question and Motion to Abate the Hearing and Discovery Schedule. It sought

- either certification of two jurisdictional questions to the TCEQ Commissioners or, pursuant to 30 TAC § 80.131(a), an opportunity to file an interlocutory appeal of the February 22, 2010 Order to the Commissioners. The ED and OPIC did not oppose the motion.
26. By Order dated March 9, 2010, the ALJ declined to certify the questions proposed by Respondent, but abated the case and gave Respondent a deadline of April 8, 2010, for filing an interlocutory appeal with the Commission. On May 13, 2010, the ED, Respondent, and OPIC filed a status report indicating Respondent had filed its interlocutory appeal and that briefs had been filed by the parties. The parties requested and were granted an extension of the abatement.
27. By letter dated June 9, 2010, the Commission's Office of General Counsel announced the matter would not be set on a Commission public meeting and that the SOAH hearing process could continue. By Order dated June 24, 2010, the ALJ lifted the abatement and required a proposed schedule. The parties filed an Agreed Proposed Hearing Schedule on July 12, 2010, and the hearing on the merits was scheduled for February 10, 2011.
28. On November 3, 2010, Respondent filed a motion seeking to compel discovery and to amend the discovery schedule. On November 9, 2010, the ED requested and was granted an agreed extension of time to respond. On November 12, 2010, the ED requested and was granted an agreed additional extension of time to respond. The ED filed its response to Respondent's motion on November 17, 2010. On December 8, 2010, Respondent filed a continuance motion to extend the discovery period. The ED filed a response on December 14, 2010, and agreed to the 30-day extension. For good cause shown, the ALJ extended the discovery deadline. On January 13, 2011, the ED filed a Motion to Quash Oral Depositions noticed by Respondent for January 13, 2011. The ED's motion was granted and the depositions of Chris Wiatrek and Ms. Roecker were set for dates on which they were available, January 24 and 25, 2011. On January 18, 2011, Respondent filed a Motion to Quash the ED's Notice to Take Oral Deposition. The ED filed a response on January 20, 2011, and also filed a Motion to Compel.
29. On January 21, 2011, the ED and Respondent appeared through counsel at a telephonic prehearing conference. Pursuant to that prehearing conference, the case management schedule was modified and the hearing on the merits was continued from February 10, 2011,

- to March 10, 2011. The ALJ also ruled on the pending discovery disputes involving depositions, document production, responses to interrogatories and admission requests, and privileged document logs.
30. On February 24, 2011, Respondent filed a Motion to Strike or in the Alternative Motion for Continuance. Respondent objected to the ED's First Amended Preliminary Report and Petition (EDFAPRP) filed on February 10, 2011. By Order No. 12 dated February 25, 2011, the ALJ denied Respondent's motion in all respects because the ED filed the EDFAPRP prior to the March 2, 2011 deadline established in Order No. 11.
  31. The hearing on the merits convened on March 10, 2011, before ALJ Seitzman in the William P. Clements Building, 300 West 15<sup>th</sup> Street, Fourth Floor, Austin, Texas. The ED was represented by Ms. Cook, Attorney, Litigation Division. Respondent was represented by its legal counsel, Mr. Wilburn. The hearing recessed when, due to a credible bomb threat, the William P. Clements Building was evacuated and closed. By agreement of the parties, the hearing on the merits reconvened and concluded on June 14, 2011. Written closing arguments and replies were timely submitted by both parties and the record closed on September 2, 2011.
  32. Under the 2003 legislation, once Respondent timely filed its Application, its Registration allowed it to continue composting grease trap waste throughout the permit application process. When the Application was denied, Respondent was no longer authorized to compost grease trap waste under the Registration.
  33. Respondent's Registration did not authorize the processing of grease trap waste other than by composting.
  34. After July 15, 2008, Respondent did not possess a permit or other authorization to compost or otherwise process grease trap waste.
  35. Grease trap waste is both a municipal solid waste and a solid waste.
  36. Based upon the evidence presented at the hearing on the merits, an appropriate administrative penalty would be \$103,800.
  37. An administrative penalty of \$103,800 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in TEX. WATER CODE § 7.053 and in the Commission's 2002 Penalty Policy.

## II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Water Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE § 7.052, a penalty may not exceed \$10,000 per violation, per day, for the violations at issue in this case.
3. Respondent is subject to the Commission's enforcement authority, pursuant to TEX. WATER CODE § 7.002. Additionally, the Commission may order Respondent to take corrective action, pursuant to TEX. WATER CODE § 7.073.
4. As required by TEX. WATER CODE § 7.055 and 30 TAC §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations, the penalties, and the corrective actions proposed therein.
5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE § 7.058; 1 TAC § 155.401, and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations and the proposed penalties.
6. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
7. A motion for rehearing is overruled by operation of law 45 days after the date the party is notified of the order that may become final.
8. By law, the May 23, 2008 Order was final on July 15, 2008, 45 days after May 31, 2008.
9. Beginning July 16, 2008, Respondent had no legal authorization to compost grease trap waste.
10. Respondent composted grease trap waste, a municipal solid waste and a solid waste, without authorization.
11. Based on the above Findings of Fact, Respondent violated TEX. HEALTH & SAFETY CODE § 361.428(d); Act of June 20, 2003, 78th Leg., R.S., ch. 596, §§ 1-3, 2003 Tex. Gen. Laws 1968, amended by Act of January 11, 2004, 78th Leg., 3rd C.S., ch. 3, § 8.02, sec. 2, 2003 Tex. Gen. Laws 89; and 30 TAC §§ 330.7(a), 330.9(a), 330.15(a), and 332.3(a)(B).

12. In determining the amount of an administrative penalty, TEX. WATER CODE § 7.053 requires the Commission to consider several factors including:
  - The violation's impact or potential impact on public health and safety, natural resources and their uses, and other persons;
  - The nature, circumstances, extent, duration, and gravity of the prohibited act;
  - The history and extent of previous violations by the violator;
  - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
  - The amount necessary to deter future violations; and
  - Any other matters that justice may require.
13. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
14. Based on consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE § 7.053, and the Commission's Penalty Policy, a total administrative penalty of \$103,800 is justified and should be assessed against Respondent.
15. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures that the ED recommends.

**NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. Micro Dirt, Inc., d/b/a/ Texas Organic Recovery (Respondent) is assessed an administrative penalty in the amount of \$103,800 for violation of TEX. HEALTH & SAFETY CODE § 361.428(d); Act of June 20, 2003, 78th Leg., R.S., ch. 596, §§ 1-3, 2003 Tex. Gen. Laws 1968, amended by Act of January 11, 2004, 78th Leg., 3rd C.S., ch. 3, § 8.02, sec. 2, 2003 Tex. Gen. Laws 89; and 30 TAC §§ 330.7(a), 330.9(a), 330.15(a), and 332.3(a)(B). The payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order completely resolve the matters set forth by this Order in this action. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay



the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: Micro Dirt, Inc.; TCEQ Docket No. 2009-0096-MSW-E" to:

Financial Administration Division, Revenues Section  
Attention: Cashier's Office, MC 214  
Texas Commission on Environmental Quality  
P.O. Box 13088  
Austin, Texas 78711-3087

2. Immediately upon the effective date of the Commission Order, Respondent shall cease unauthorized accepting, processing, or composting of grease trap waste, or the use or operation of a solid waste facility to process grease trap waste until proper authorization is received from the TCEQ.
3. Within 45 days after the effective date of the Commission Order, Respondent shall submit written certification and detailed supporting documentation, including photographs, receipts, and /or other records, to demonstrate compliance with Ordering Provision No. 2. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

Respondent shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions to:

Order Compliance Team  
Enforcement Division, MC 149A  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

with a copy to:

Barry Kalda, Waste Section Manager  
Texas Commission on Environmental Quality  
Austin Regional Office  
2800 S. IH-35, Suite 100  
Austin, Texas 78704-5712

4. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
5. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
6. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
7. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
8. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

**ISSUED:**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Bryan W. Shaw, PhD, Chairman**  
**For the Commission**